

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
 Petition of Global NAPs South, Inc. for)
 Preemption of the Jurisdiction of the)
 Pennsylvania Public Utility Commission)
 Regarding Interconnection Dispute with)
 Bell Atlantic-Pennsylvania)

CC Docket No. 99-169

RESPONSE OF BELL ATLANTIC¹

The Commission should deny the Global NAPs South, Inc.'s ("GNAPs") preemption petition. Like other petitions it recently filed, the only issue that GNAPs wants the Commission to rule on here is whether it can opt into the reciprocal compensation provision of an interconnection agreement that is about to expire, and then to extend that provision – which expressly applies only to "local" calls – to apply as well to Internet calls for an entirely new three year term. But as GNAPs itself acknowledges, GNAPs presented the same issue to the Pennsylvania Public Utility Commission – which is the regulatory agency that this Commission held should decide the issue. In fact, the Pennsylvania Commission recently dismissed GNAPs' arbitration petition, directed that it be considered as a complaint (an alternative remedy that GNAPs itself proposed), and remanded the matter to its Office of Administrative Law Judge for expedited disposition. Therefore, there is no arbitration proceeding before the Pennsylvania Commission, and

¹ The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

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GNAPs' remedy if it wants the Pennsylvania order reviewed lies in federal district court. And GNAPs' unfounded attack on the competency of the Pennsylvania Commission provides no basis for interfering with its ongoing proceedings or for requiring the parties to expend the resources to litigate the same issues before this Commission.

ARGUMENT

GNAPs is a so-called "carrier" that exists solely to skim off "reciprocal compensation" payments for calls to the Internet. As GNAPs has said publicly in a filing with the Pennsylvania Commission, 99% of its consolidated revenues have come from "reciprocal compensation" payments in connection with Internet calls, and those payments represented nearly 12 times its direct costs. And GNAPs' today receives more than twelve million dollars a year in such compensation from Bell Atlantic in Massachusetts alone.²

This sort of gaming of the regulatory process does nothing to further the pro-competitive policies of the Act or this Commission. Instead, GNAPs has merely taken advantage of what the Massachusetts Department of Telecommunications and Energy recently called an "arbitrage opportunity derived from regulations that were designed to promote real competition. A loophole, in a word."³ Now it wants to opt into another interconnection agreement that applies by its express terms only to local traffic, to improperly apply the reciprocal compensation provision in that agreement to Internet

² Bruce Mohl, "State ruling could boost on-line fees," BOSTON GLOBE (May 19, 1999).

³ *Complaint of MCI WorldCom Against New England Tel. and Tel. Co d/b/a Bell Atlantic-Massachusetts for Breach of Interconnection Terms Entered Into Under Sections 251 and 251 of the Telecommunications Act of 1996*, D.T.E. 97-116-C at 32 (Mass. D.T.E., rel. May 19, 1999) (footnote omitted).

calls, and to extend that agreement (which expires in a month) for another three-year term. Doing so would merely perpetuate a private gravy train that provides no public benefit.

The bulk of GNAPs' petition is an attack on the merits of the Pennsylvania Commission's dismissal of GNAPs' petition for arbitration. The Pennsylvania Commission determined that where, as here, the sole dispute between an incumbent local exchange carrier and its competitor is whether the competitor is entitled to opt into another carrier's entire interconnection agreement, there is nothing to arbitrate. Under these circumstances, there are no "open" or "unresolved" issues arising from negotiations over the terms of an agreement to be resolved, and the arbitration provisions of section 252 of the Act are inapplicable. Instead, the Pennsylvania Commission found that the issue of whether or not GNAPs has the right to opt into another agreement must be litigated pursuant to the Pennsylvania Commission's complaint procedures – an alternative result that GNAPs itself had proposed.⁴ If GNAPs wants review of the order dismissing its arbitration, its remedy lies in federal district court. 47 U.S.C. § 252(e)(6). Therefore, GNAPs' claim is not properly before this Commission.

GNAPs' petition suffers from a further fundamental procedural defect. GNAPs' attempt to invoke this Commission's jurisdiction is entirely premised on an allegation that the Pennsylvania Commission has failed to act on its arbitration petition. In view of that Commission's recent dismissal of GNAPs' petition, and the fact that the Pennsylvania Commission held that it will consider GNAPs' claims under its complaint

⁴ *Petition of Global NAPs South, Inc. for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief*, Docket Number A-310771, Opinion and Order (entered May 27, 1999). A copy of the Pennsylvania Commission's order is attached.

procedures, the prerequisite to this Commission's jurisdiction under section 252(e)(5) – state inaction – has not been met.

Moreover, even if this Commission could consider the merits of GNAPs' claim – which it cannot as a matter of law, GNAPs has no right to opt into the provision in question in order to extract "reciprocal" compensation for carrying Internet calls. The agreement at issue here provides for the payment of reciprocal compensation only on local calls, expressly defined as calls that both originate and terminate in the same local calling area, and provides that the nature of the calls must be determined based on the origination and termination points of the complete end-to-end call. This Commission has expressly held that Internet calls do not terminate at the ISP's local server, but instead continue on to websites across the country and around the world, that Internet calls are not local calls, and that Internet calls are not subject to reciprocal compensation under section 251(b)(5) of the 1996 Act. *Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, FCC 99-38, ¶¶ 12-18 and n. 38 (rel. Feb. 26, 1999).

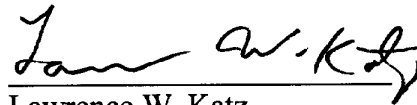
Because section 252(i) only permits other carriers to "opt-in" to provisions of interconnection agreements that are based on the requirements of section 251, and because neither the existing agreement or section 251(b)(5) requires the payment of reciprocal compensation on Internet calls, GNAPs as a matter of law cannot extend the existing agreement to apply to such calls. Nor, as a matter of law, can GNAPs extend an existing agreement that is about to expire for another three-year term. Even in instances where 252(i) applies – and here it does not – a carrier opting into an existing agreement

must accept all the related terms of that agreement, including the duration. And here the duration is through June of this year.⁵

For the reasons stated, the Commission should deny GNAPs' petition.

Respectfully Submitted,

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May 28, 1999

⁵ The term of the agreement is not for a stated period, as GNAPs claims, but rather expires on a specific date.

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held May 13, 1999

Commissioners Present:

John M. Quain, Chairman
David W. Rolka
Nora Mead Brownell
Aaron Wilson, Jr.

Petition of Global NAPs South, Inc.
for Arbitration of Interconnection
Rates, Terms and Conditions and
Related Relief

A-310771

OPINION AND ORDER

BEFORE THE COMMISSION:

Before the Commission for consideration is the Recommended Decision Granting Motion to Dismiss (Recommended Decision hereafter) of Administrative Law Judge (ALJ) Wayne L. Weismandel issued February 11, 1999. The February 11, 1999, Recommended Decision, *inter alia*, dismissed a Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief (Petition for Arbitration hereafter), filed by Global NAPs South, Inc. (Global NAPs) on December 8, 1998. (R.D., slip op. at 13).

On February 19, 1999, Global NAPs filed a document styled "Motion of Global NAPs, South, Inc. for Expedited Reversal and Entry of

Judgment in Global NAPs' Favor, or in the Alternative, for Redesignation of its Petition as a Complaint." We shall construe this pleading as Exceptions filed by Global NAPs to the February 11, 1999 Recommended Decision, which dismissed its Petition for Arbitration.¹

On March 12, 1999, Bell Atlantic-Pennsylvania, Inc. (Bell) filed Reply Exceptions relative to the February 19, 1999 Motion of Global NAPs, the said Motion being construed as Exceptions.²

Discussion

A. Introduction

In the proceeding now before us, Global NAPs has elected to use the procedures specified in Section 252(i) of the Telecommunications Act of 1996, 47 U.S.C. §252(i), (Act hereafter), to adopt an approved interconnection agreement. The interconnection agreement requested for adoption is *Application of MFS Intelenet of Pennsylvania, Inc. In Re: Joint Petition of Bell Atlantic-Pennsylvania, Inc. and MFS Intelenet of Pennsylvania, Inc. for Approval of Agreement for Network Interconnection and Resale*; Docket No. A-310203F0002

¹ See, generally, *Sentner v. Bell*, Docket No. F-00161106 (Order entered October 25, 1993) - the Commission is not bound by a party's characterization of its pleading.

² By letter dated February 25, 1999, Bell indicated that "in view of the absence of any provision in the Commission's rules for such a "motion," Bell Atlantic-Pennsylvania, Inc. intends to treat the pleadings as Petitioner's exceptions to ALJ Weismandel's recommended decision." Thus, Bell's view of the Motion is consistent with our treatment of same.

(Order adopted October 3, 1996) (*Bell/MFS Agreement*) Section 252(i) of the Act states:

(i) Availability to other telecommunications carriers. A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

The above-cited provision of the Act has alternately been referred to as a "Most Favored Nations Clause," the "opt-in" clause, or "election" provision of the Act. In *AT&T v. Iowa Utilities Bd.* ___ U.S. ___, 119 S. Ct. 721 (1999) (*AT&T v. Iowa*), this statutory provision of the Act was discussed in the context of the "pick and choose" rules promulgated by the Federal Communications Commission (FCC) in its order *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, (August 8, 1996) (*Local Competition Order*).

We note that in a separate Order (Tentative Form), we consider the merits of Global NAPs' application for authority to provide competitive local exchange service.

B. Procedural Background

As taken from the Recommended Decision, the History of the Proceeding is as follows:

On December 8, 1998, Global NAPs South, Inc. (petitioner) filed a Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief (Petition) concerning a proposed interconnection agreement between petitioner and Bell Atlantic-Pennsylvania, Inc. (Bell) with the Pennsylvania Public Utility Commission (Commission), Docket Number A-310771.

The Petition sets forth that petitioner has been attempting to negotiate an interconnection agreement with Bell since July 2, 1998. Further, the Petition states that because of disagreement between petitioner and Bell regarding proposed terms of an interconnection agreement, petitioner has "requested an interconnection agreement that reflects[s] all and only the terms included in [Bell's] Interconnection Agreement with [MFS Intelenet of Pennsylvania, Inc.] (MFS)" pursuant to §252(i) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §151 et seq, (TA-96). In fact, the Petition identifies as all matters that remain open, that is, "specific issues in dispute", only disputes regarding the interpretation of specific provisions of the MFS Interconnection Agreement sought either by petitioner or by Bell.

* * *

On January 4, 1999, Bell filed and served its Answer and New Matter (Answer), endorsed with a Notice to Plead, to the Petition. Also on January 4, 1999, Bell filed and served its Motion to Dismiss (Motion) the Petition. Bell's Motion averred that the election or "opt-in" rights granted by §252(i) of TA-96 are not within the arbitration provisions [252(b), (c), (d), and (e)] of TA-96 and, alternatively, the petitioner had not timely filed its Petition.

* * *

On January 7, 1999, an Initial Prehearing Telephone Conference was held. Petitioner, Bell, and [the Commission's Office of Trial Staff] OTS participated. Susan J. Shanaman, Esquire, on behalf of petitioner, moved the admission pro hac vice of William J. Rooney, Jr., Esquire, and of Christopher W. Savage, Esquire, both to represent petitioner. The motion being unopposed, it was granted.

* * *

Bell filed and served its Amended Answer and its Amended Motion on January 11, 1999. The Amended Motion withdrew Bell's averment that petitioner had not timely filed its Petition. The Amended Motion restated Bell's averment that the election or "opt-in" rights granted by §252(i) of TA-96 are not within the arbitration provisions [§252(b), (c), (d), and (e)] of TA-96.

On January 13, 1999, petitioner filed and served its Answer to the Motion to Dismiss (Response) and a Motion for Summary Judgment (Summary Judgment Motion). The Summary Judgment Motion requested that Bell be ordered to enter into an interconnection agreement with petitioner "on the same terms and conditions as contained in Bell Atlantic's agreement with MFS."

On February 2, 1999, Bell filed and served its Answer to Motion for Summary Judgment (Summary Judgment Motion Answer) and a Cross-Motion for Summary Judgment (Cross-Motion).

Bell's Amended Motion is, therefore, procedurally ready to be ruled upon.

(R.D., pp. 2-4) (Note omitted).

C. ALJ Recommendation

ALJ Weismandel reached the Following Findings of Fact:

1. Petitioner filed its Petition on December 8, 1998.
2. The Petition requests “an interconnection agreement that reflect[s] all and only the terms included in [Bell’s] Interconnection Agreement with [MFS Intelenet of Pennsylvania, Inc.] (MFS)” pursuant to §252(i) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§151 et seq. (TA-96).
3. On January 4, 1999, Bell filed and served its Motion.
4. Bell’s Motion averred that the election or “opt-in” rights granted by §252(i) of TA-96 are not within the arbitration provisions [§252(b), (c), (d), and (e)] of TA-96 and, alternatively, that the Petition was not timely filed.
5. During an Initial Prehearing Telephone Conference on January 7, 1999, it was agreed that Bell would file and serve an Amended Answer and Amended Motion and that petitioner’s answer to Bell’s Amended Motion would be due not later than January 14, 1999.
6. Bell filed and served its Amended Motion on January 11, 1999.
7. Bell’s Amended Motion withdrew Bell’s averment that the Petition was not timely filed, and restated Bell’s averment that the election or “opt-in” rights granted by §252(i) of TA-96 are not within the arbitration provisions of TA-96.

8. On January 13, 1999, petitioner filed and served its Response and its Summary Judgment Motion.
9. On February 2, 1999, Bell filed and served its Summary Judgment Motion Answer and its Cross-Motion.

(R.D., pp. 5-6).

ALJ Weismandel, thereafter, reasoned that the sole issue to be decided in ruling upon Bell's Amended Motion to Dismiss and Global NAPs' response, is whether or not Global NAPs' election to avail itself of the "opt-in" or "most favored nation" right provided by the Act, 47 U.S.C. §§251; 252, is arbitrable under Sections 252(b), (c), (d), and (e). (R.D., p. 6). ALJ Weismandel observed that the question was one of first impression for this Commission. Therefore, he considered proceedings from other jurisdictions for guidance as to the pertinent law and policy that should be applied to the instant matter. (R.D., p. 7).

Two (2) proceedings from other jurisdictions were considered by ALJ Weismandel, *Re Sprint Communications Co., L.P.*, ARB 11 Order No. 97-229 (Slip opinion June 20, 1997) of the Oregon Public Utility Commission (*Oregon PUC Decision*) and *In the Matter of the Petition of Global NAPs Inc. for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Bell Atlantic-New Jersey Pursuant to Section 252(b) of the Telecommunications Act of 1996*, of the New Jersey Board of Public Utilities, Docket No. TO98070426, Recommended Interim Final Decision Of The Arbitrator, dated October 26, 1998 (*New Jersey PUC Decision*). (R.D., pp. 7-9).

In the *Oregon PUC Decision*, it was determined that the interconnection proceedings of Section 252(a)-(d) of the Act and the resulting interconnection agreement, Section 252(e), were mutually exclusive and competing provisions from the “opt-in” procedures of Section 252(i). Therefore, the Oregon PUC concluded that a CLEC’s election to adopt an interconnection agreement “as a whole” would not leave any open or unresolved issues. Thus, that commission concluded the election process of the Act would be beyond the scope of a pending arbitration proceeding.³

In the *New Jersey PUC Decision*, an apparently different result was obtained. A New Jersey arbitrator did find it appropriate to consider the CLEC’s, (in this case Global NAPs’), election to opt into an existing, approved interconnection agreement, in conjunction with a pending arbitration proceeding.⁴ ALJ Weismandel did not find any discussion in the New Jersey proceeding as to

³ In this case there is no dispute concerning whether Section 252(i) of the Act permits a requesting CLEC to opt-in on a provision by provision basis or whether the agreement must be taken as a whole. Global NAPs has clearly expressed its intent to adopt the “whole” *Bell/MFS Interconnection Agreement*. See Global NAPs Exc., p. 4, n. 3, referring to the *AT&T v. Iowa* and Eighth Circuit *Iowa v. FCC*, *infra*, cases where it discusses the distinction between the election rights of Section 252(i) on a “whole contract” basis, versus a right to “pick and choose” from the contract.

⁴ In the New Jersey proceeding three (3) of the open or unresolved issues (as restated by the New Jersey arbitrator) presented were as follows:

1. Is Global NAPS Inc. entitled to most favored nation status in regard to other interconnection agreements?
2. When opting into a preexisting interconnection agreement under most favored nation status, is a party bound to the agreement in its entirety, or is it free to opt-in on a provision by provision basis?
3. If Global NAPS, Inc. is able to opt into [an approved interconnection agreement between MFS and Bell], what should the duration of the contract be? (R.D., p. 8, n. 2).

whether that commission found an election under Section 252(i) to be arbitrable, however. (R.D., p. 9).

Based on the foregoing, ALJ Weismandel was persuaded that the reasoning of the Oregon Public Service Commission was the better view. He concluded:

In exercising a statutory right to "opt-in" to an entire existing approved interconnection agreement, as petitioner here desires to do, there are simply no open, or unresolved, issues to be arbitrated. While matters of contract interpretation may well need to be subsequently addressed, those matters do not constitute open or unresolved issues subject to TA-96's arbitration proceeding. The mechanism for pursuing interpretation of terms contained in an existing approved interconnection agreement "opted-into" by another carrier is not a petition to arbitrate under TA-96 §252, but rather, a formal complaint alleging that the ILEC is violating the provision of TA-96 §252(i). See, *Focal Communications Corporation of Pennsylvania v. Bell Atlantic-Pennsylvania, Inc.*, Docket Number C-00981641, Initial Decision of Administrative Law Judge Herbert Smolen, dated January 12, 1999.

I find that the sole issue raised by the Petition, petitioner's right to elect "an interconnection agreement that reflect[s] all and only the terms included in [Bell's] Interconnection Agreement with [MFS Intelenet of Pennsylvania, Inc.] (MFS)" pursuant to §252(i) of TA-96 is not properly raised in this proceeding for arbitration of an interconnection agreement pursuant to the arbitration provisions [§252(b), (c), (d), and (e)] of TA-96. Consequently,

Bell's Amended Motion will be granted and the
Petition dismissed.

(R.D., pp. 9-10).

Based on the foregoing reasoning, ALJ Weismandel reached these
Conclusions of Law:

* * *

2. A telecommunications carrier has the right to elect the same terms and conditions as are contained in an existing approved interconnection agreement with a local exchange carrier, pursuant to §252(i) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§151 et seq.
3. Upon the timely submission of a petition, the Pennsylvania Public Utility Commission shall arbitrate any open or unresolved issues between a telecommunications carrier and a local exchange carrier, pursuant to §252(b), (c), (d), and (e) of the Telecommunications Act of 1996.
4. When a telecommunications carrier requests a local exchange carrier to provide "an interconnection agreement that reflect[s] all and only the terms included in [an existing approved] Interconnection Agreement" there are no open or unresolved issues to be arbitrated.
5. An election to "opt-into" an existing approved interconnection agreement pursuant to §252(i) of the Telecommunications Act of 1996 and the right to have a State commission arbitrate open or unresolved issues pursuant to §252(b), (c),

(d), and (e) of the Telecommunications Act of 1996 are mutually exclusive procedures.

6. Petitioner's right to elect "an interconnection agreement that reflect[s] all and only the terms included in [Bell's] Interconnection Agreement with [MFS Intelenet of Pennsylvania, Inc.] (MFS)" pursuant to §252(i) of the Telecommunications Act of 1996 is not properly raised in this proceeding for arbitration of an interconnection agreement pursuant to the arbitration provisions [§252(b), (c), (d), and (e)] of the Telecommunications Act of 1996.
7. A hearing is necessary only to resolve disputed questions of fact, and when the question presented is one of law, the Commission need not hold a hearing.
8. This case does not involve disputed questions of fact, but rather a question of law only.
9. A hearing is not necessary in the public interest in this case.

(R.D. at 11-12).

Consequently, the presiding ALJ recommended, *inter alia*, the dismissal of the Global NAPs Petition for Arbitration.

D. Global NAPs' Exceptions

First, Global NAPs argues that its dispute with Bell is arbitrable. (Global NAPs Exc., p. 1). However, Global NAPs concedes that "Bell Atlantic and Global NAPs do not appear to have any disputes about the actual *contractual*

provisions that would be included in a “Global NAPs” version of the MFS Agreement. Instead, their disputes relate to what the contractual provisions in that existing agreement **mean**, *i.e.*, how the contract should be interpreted in certain situations. For this reason, Judge Weismandel is correct that this case presents no issues of fact, but only issues of law.” (Global NAPs Exc., pp. 1-2; note omitted) (Emphasis original).

Global NAPs does allege that the presiding ALJ erred in two (2) respects. Global NAPs argues that the ALJ erred in deciding that the arbitration provisions of the Act do not apply to this dispute and that its remedy is to file a complaint against Bell alleging a breach of Section 252(i). (Global NAPs Exc., p. 2). Global NAPs states that as a matter of statutory interpretation, a state commission is obliged to arbitrate all “open issues” between the parties. In this case, the key “open issue” is whether Global NAPs is entitled to opt in to the *Bell/MFS Agreement*. (Global NAPs Exc., p. 2).

Global NAPs further asserts that the ALJ committed error in concluding that the situation here is similar to that faced by the Oregon Public Service Commission. Global NAPs attempts to distinguish the *Oregon PUC Decision* from this case by pointing out that the CLEC in the Oregon proceeding tried to derail its own ongoing arbitration proceeding in favor of opting-in to a new, unrelated agreement within the nine-month arbitration deadline. (Global Exc., pp. 2-3).

Global NAPs further explains its position as follows:

Global NAPs originally sought to negotiate a hand-crafted interconnection agreement with Bell Atlantic, but by August 1998 it became quite clear to Global

NAPs that it would not be able to negotiate a contract that was any better, overall, than the contract MFS had already negotiated. Global NAPs therefore asked Bell Atlantic to opt into the MFS Agreement, assuming that its request would be honored promptly.

. . . Instead, Bell Atlantic insisted that Global NAPs could only opt into the MFS Agreement if, in addition to the terms contained in the agreement, Global NAPs would accept a number of extraneous terms that amounted to Bell Atlantic's views on how the MFS Agreement would be interpreted in particular situations. Global NAPs disagreed with Bell Atlantic's interpretations, but -- more fundamentally -- believed that it was entitled to opt into the MFS Agreement without any such conditions at all.

(Global NAPs Exc., p. 3).

Global NAPs concludes this issue by bringing to the attention of this Commission the fact that when its efforts to resolve this matter failed, i.e. the impasse reached as a result of the alleged extraneous conditions raised by Bell, that it filed the Petition for Arbitration. Thus, its arbitrable or open issue is an issue that turns entirely on matters of law. (Global NAPs Exc., p. 4).⁵

Finally, Global NAPs argues that if this Commission does not consider the Petition for Arbitration to present an arbitrable issue, then we should redesignate its Petition as a complaint. (Global Exc., pp. 5-6).

⁵ Global NAPs repeats its position that this Commission should, in the alternative, remand the matter to the ALJ for a determination on the record before him. It also argues that its right is so clear that we may consider a ruling on the merits without any remand at all. See Exc., p. 4, n. 4.

E. Bell's Replies

Bell, in its Replies, takes the threshold position that the procedural advancement of this case has a bearing on whether it will have the opportunity to present factual circumstances which, it alleges, bear on Global NAPs' right to the *Bell/MFS Agreement*. (Bell R. Exc., p. 3). Bell alleges that "GNAPs has argued that its invocation of the arbitration provisions of the Act precludes BA-PA from introducing facts that would show that an agreement between GNAPs and BA-PA incorporating the terms of the MFS agreement would be inconsistent with the public interest, convenience, and necessity." (Bell Exc., p. 3) (Note omitted).

Bell goes on to urge its support of the ALJ conclusion that an election under Section 252(i) of the Act should present no open or unresolved issues. (Bell R. Exc., pp. 5-6). Bell takes the position that it was unwilling to agree to Global NAPs' demand for the old, negotiated MFS reciprocal compensation rates because "the gross imbalance in traffic exchange would make the cost of interconnection with GNAPs much higher than the cost of interconnection with MFS." (R.Exc., p. 6 citing Section 252(b) of the Act). Thus, Bell further argues that the position of Global NAPs is to deprive Bell of the opportunity to show that the demand for the old MFS rates is calculated not to compensate Global NAPs for the cost of terminating calls from Bell's customers, but to generate an "unearned windfall" at Bell's expense, and cannot be squared with the Commission's orders implementing the pricing provisions of the Act. (R.Exc., p. 7 citing *Application of MFS Intelenet of Pa.*, Docket No. A-310203F0002 (Order entered August 7, 1997) (*MFS Phase III*); *Focal Communications v. Bell*, *supra*, - where presiding ALJ Smolen concluded that it would be unreasonable to ascribe to Congressional intent a mandate that the state commission permit the adoption of a prior-approved

interconnection agreement without an opportunity to refine and implement the state commission's latest approach in encouraging competition as determined by refinements made subsequent to the originally approved agreement; also 47 C.F.R. §51.809(b)(1)-(2).

Last, Bell opposes the alternative request that this Commission "redesignate" the Petition for Arbitration as a formal complaint and remand the same for disposition on the merits by the presiding ALJ. Bell opposes this request because it alleges that Global NAPs has disregarded Commission procedure, Global NAPs has failed to state a claim for which relief may be granted, and, even were the matter redesignated as a complaint, Bell would be entitled to summary judgment in its favor. (R. Exc., pp. 9-11).

F. Disposition

1. Section 252(a)-(d) and Section 252(i) Provide Distinct Procedures Under the Act

On consideration of the Recommended Decision, and the Exceptions and Replies, we agree with the presiding ALJ's conclusions that the opt-in provisions of the Act, and the arbitration provisions of the Act, are distinct proceedings.

In the *Local Competition Order*, the FCC clearly articulated its position that the opt-in provisions of Section 252(i), should offer a more expedient procedural alternative for the CLEC to obtain an interconnection agreement than the negotiation and arbitration provisions of Sections 251 or 252 - "We conclude that the nondiscriminatory, pro-competition purpose of section 252(i) would be

defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251 before being able to utilize the terms of a previously approved agreement.” (*Local Competition Order*, Para. 1321; also Global NAPs Exc., p. 5). This is logical. The rights under Section 252(i) relate to an existing and approved interconnection agreement which has been filed and made publicly available by the state commission. See 47 U.S.C. § 252(h). The determination by a requesting CLEC to obtain such an agreement should not be characterized by undue delay as there are, theoretically, no “open” or “unresolved” issues.

On the basis of the foregoing, we adopt the conclusion of ALJ Weisman. The reasoning of the Oregon Public Service Commission appears sound and most consistent with the FCC’s discussion of this provision of the Act. We do not, however, go as far as the *Oregon PUC Decision*, and ALJ Weisman, and conclude that the opt-in process and the arbitration process are mutually exclusive and competing. (Finding of Fact No. 5). We decline to speculate on the type of scenario in which a CLEC may be in the position of having to pursue the option to elect an approved interconnection agreement and arbitrate open or unresolved issues. Yet, we note that in *Sprint Communications Company, L.P. Petition for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with GTE North, Inc.*; Docket No. A-310183F0002 (Order entered January 13, 1997), this Commission was faced with the procedural dilemma which arose in an arbitration proceeding. In the *Sprint/GTE Arbitration* this Commission had to use a record established in a separate arbitration proceeding as the best information available to resolve substantially similar and disputed pricing and related issues in order to fulfill our

obligations regarding arbitration within the nine (9) month time frame established by the Act.

Therefore, while we agree with ALJ Weismandel that the negotiation and compulsory arbitration proceedings are distinct from the opt-in procedures, we do not further adopt his Conclusion of Law No. 5 that, in all circumstances, such remedies are to be viewed as mutually exclusive and competing. *See* Global NAPs Opposition to Motion to Dismiss, p. 5.

2. What Procedure Should Govern a Request Under Section 252(i)

We conclude that the pleadings in this matter be construed as a formal complaint of Global NAPs, already filed, subject to the following expedited process which is to be followed in all such future complaints where an ILEC refuses to permit a CLEC to opt-in to an approved interconnection agreement.

Once a CLEC files a formal complaint, the ILEC has ten (10) days to file its answer. A hearing shall be conducted and an Initial Decision shall be issued within twenty (20) days from the date of the filing of the answer. This expedited hearing is limited to the issues of whether the ILEC can show that there has been increased cost or technical infeasibility since the previously negotiated interconnection agreement.

We also note that there appears to be a consensus regarding the use of the formal complaint process to resolve a request to opt-in to an approved interconnection agreement. *See* positions of the parties.

Based on the foregoing considerations, the procedural recourse of filing a formal complaint under the expedited process established in this Opinion and Order is sufficient to comply with the Act, the FCC's *Local Competition Order*, and this Commission's Chapter 30, 66 Pa. C.S. §§3001-3009, obligations to afford CLECs an expedient avenue to obtain an interconnection agreement.

3. Whether the Petition Should Be Redesignated as a Complaint

Consistent with our discussion, we shall grant the alternative relief requested by Global NAPs and remand its Petition for Arbitration to the Office of Administrative Law Judge for disposition, consistent with our Order.

4. The Merits of the Proceedings on Remand

On review of ALJ Weismandel's Recommended Decision, we agree with his conclusion that disputes over the particular interpretations of a provision which are part of an existing interconnection agreement are distinct issues from questions concerning the availability of the agreement itself. Disputes over the interpretation to be given various provisions in an interconnection agreement should not delay or otherwise impede the process of opting in as envisioned by Section 252(i) of the Act. Therefore, we remand for proceedings consistent with our discussion herein.

Based on the foregoing, we direct that the remand shall be limited to the two (2) impediments set forth in 47 CFR §51.809(b) and that the proffer of information extraneous to the *Bell/MFS Agreement* or inconsistent with the federal regulation be excluded.

Conclusion

Based on the foregoing, we shall adopt the ALJ recommendations as modified by the discussion herein; **THEREFORE,**

IT IS ORDERED:

1. That the Recommended Decision Granting Motion to Dismiss of Administrative Law Judge Wayne L. Weismandel issued February 11, 1999, is adopted as modified, consistent with the discussion contained in this Opinion and Order.

2. That the Exceptions and Replies of Global NAPs South, Inc. and Bell Atlantic-Pennsylvania, Inc. are granted and denied only to the extent consistent with the instant Opinion and Order.

3. That the Motion of Global NAPs, South, Inc. for Expedited Reversal and Entry of Judgment in Global NAPs' Favor, or in the Alternative, for Redesignation of its Petition as a Complaint is granted, to the extent its Petition for Arbitration of Interconnection Rates, Terms, and Conditions and Related Relief With Bell Atlantic-Pennsylvania, Inc. is construed as a formal complaint, raising the question of the availability of a filed interconnection agreement pursuant to 47 U.S.C §252(i).

4. That Bell Atlantic-Pennsylvania, Inc. shall be provided ten (10) days from the date of entry of this Opinion and Order to file any response to the formal complaint of Global NAPs South, Inc.

5. That the record of this matter shall be reopened and the Petition of Global NAPs South, Inc. for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief is remanded to the Office of Administrative Law Judge for proceedings consistent with this Opinion and Order. That a hearing shall be conducted and an Initial Decision shall be issued within twenty (20) days from the date of the filing of an answer. The expedited hearing is limited to the issues of whether the ILEC can show that there has been increased cost or technical infeasibility since the previously approved agreement.

BY THE COMMISSION,



James J. McNulty
Secretary

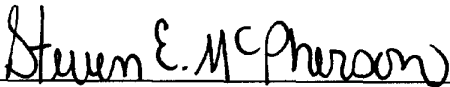
(SEAL)

ORDER ADOPTED: May 13, 1999

ORDER ENTERED: **MAY 27 1999**

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May, 1999, copies of the foregoing
"Response of Bell Atlantic" were sent by first class mail, postage prepaid, to the parties
on the attached list.



Steven E. McPherson

* Via hand delivery.

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